SINGAPORE REPORTS

The Official Assignee of the Property of Lim Chiak Kim, A Bankrupt v United Overseas Bank Ltd

COURT OF APPEAL (SINGAPORE) – CIVIL APPEAL NO 16 OF 1986
WEE CHONG JIN CJ, SINNATHURAY AND THEAN JJ
25 AUGUST 1988

Bankruptcy – Execution against property of debtor – Whether execution creditor entitled to benefit of execution as against Official Assignee – Whether execution completed prior to execution creditor receiving notice of act of bankruptcy committed by debtor – Bankruptcy Act (Cap 20, 1985 Ed), s 49

Civil Procedure – Execution against property of debtor – Whether execution creditor entitled to benefit of execution as against Official Assignee – Whether execution completed prior to execution creditor receiving notice of act of bankruptcy committed by debtor – Charging order – Effect of – Whether constitutes a charge or creates security interest in immovable property affected – Whether a form of execution of judgment – Rules of the Supreme Court 1970, O 50 r 1 – Supreme Court of Judicature Act (Cap 322, 1985), s 18(2)

Land Law – Charging order – Effect of – Whether constitutes a charge or creates security interest in immovable property affected – Mortgage – Effect of – Whether operates as a transfer of property affected or as a security only – Land Titles Act (Cap 157, 1985 Ed), ss 63, 68 – Rules of the Supreme Court 1970, O 50 r 1 – Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 18(2)

On 24 October 1984, the respondents United Overseas Bank Ltd ('the bank') obtained a judgment for the sum of $24,759.93 with interest and costs ('the judgment sum') against one Lim Chiak Kim ('Lim'). On 3 November 1984, following an ex parte application by the bank, a charging order nisi was made imposing a charge on the land and premises belonging to Lim ('the property'). At that time, the property had already been brought under the provisions of the Land Titles Act (Cap 157, 1987 Ed) and had been mortgaged by Lim in favour of The Bank of Canton Ltd ('the mortgagees'). To protect the interest of the bank, a caveat claiming an interest in the property by virtue of the charging order nisi was lodged with the Registry of Titles. Before the charging order nisi was made absolute, the bank applied for and obtained an order on 24 October 1984 appointing receivers to enforce the order and on 30 November 1984 the charging order was made absolute. Again, a caveat claiming an interest in the property by virtue of the charging order absolute was lodged with the Registry of Titles on behalf of the bank. Thereafter, neither the bank nor the receivers appeared to have taken any step towards enforcing the order absolute or otherwise.

On 26 February 1985, the mortgagees exercised their power of sale and sold the property to a purchaser under a sale and purchase agreement. Another creditor of Lim's, namely, Heller Factoring (Singapore) Ltd ('Heller Factoring'), obtained a judgment against Lim and later took out a bankruptcy notice which was served on Lim on 29 March 1985. He failed to comply with the bankruptcy notice and, following that, Heller Factoring presented a bankruptcy petition against Lim on 15 May 1985 and on the following day gave notice of Lim's act of bankruptcy to the bank.

On 27 May 1985, the mortgagees completed the sale of the property and received the proceeds thereof, part of which was applied towards payment of the amount due to them and the balance was held by them or their solicitors. On 26 July 1985, receiving and adjudication orders were made against Lim in the bankruptcy proceedings initiated by Heller Factoring and the Official Assignee was thereupon constituted the receiver of Lim's estate. The balance of the proceeds of sale then in the hands of the mortgagees or their solicitors was paid to the Official Assignee. Consequently, the bank claimed from the Official Assignee the judgment sum. The claim was resisted by the Official Assignee on the ground that the execution of the judgment had not been completed. The bank then applied to the High Court for an order directing the Official Assignee to pay to the bank the judgment sum and costs. The application was heard by Wahab Ghows J and he allowed the application. The Official Assignee appealed.

The two main issues which arose in the appeal were: (a) whether the charging order absolute obtained by the bank constituted a charge on the property; and (b) if the answer was in the affirmative, whether the bank was entitled to payment of the judgment sum out of the balance of proceeds of sale of the property.

It was argued on behalf of the Official Assignee that a charging order made under O 50 r 1 of the Rules of the Supreme Court 1970 does not constitute a charge or create any security interest on the immovable property affected but operates only as a stop notice.

Another question which arose was whether the charge the bank had on the property was one falling within s 68(1) of the Land Titles Act which provided that the mortgagees upon receipt of the proceeds of sale on completion thereof were obliged to hold the same on trust in payment and discharge of the amounts and in the order as therein directed, and, in particular, in payment to themselves of the amount due and secured by the said mortgage and thereafter in payment of any subsequent mortgage or charge in order of their priority and as for the residue, if any, in payment to the person who appears from the land register to be entitled to the property.

Held, allowing the appeal: (1) The provisions of O 50 r 1 and the forms of order prescribed thereby are too clear and explicit to admit of any argument that a charging order does not constitute a charge on the immovable property against which it was made.

(2) In the instant case, there was imposed on the property a charge created by the order nisi. It was an interim one and defeasible. However, on further consideration under r 1 (6) of O 50, that order was replaced by an order absolute imposing a charge on the property and, unlike its predecessor, this charge was not defeasible. The order nisi and the order absolute each imposed an immediate charge on the property.

(3) The charge imposed was one constituted by a charging order. It was a statutory charge. It was not a legal charge created under s 63(2) of the Land Titles Act. It was, however, a charge on the whole of the estate held by Lim in the property subject to any prior encumbrance.

(4) Prior to the making of the charging order nisi, Lim had by an instrument under s 63(1) of the Land Titles Act created a mortgage in favour of the mortgagees, and by s 63(3), that mortgage did not operate as a transfer of the said property but took effect as a security only. Hence at the material time, ie when the charging order nisi and the charging order absolute

were made, the legal estate in the property remained vested in Lim. The learned trial judge was therefore in error when he said that Lim had an equity of redemption in the property. He had the legal estate subject only to the mortgage in favour of the mortgagees.

(5) The expression 'charge' in s 68(1) of the Land Titles Act means a charge created under s 63(2) of the Act and does not include any other kinds of charge, such as a charge created by the charging order absolute in the instant case. Though the charge constituted by the charging order absolute was not a charge registrable under the Land Titles Act, it was nonetheless a charge on the property. The Act recognizes non-registrable interests in land, and under s 104 of the Act any person claiming an interest in land, or any person otherwise authorized by any Act to do so, may lodge with the Registrar of Titles a caveat in a prescribed form to protect such interest.

(6) The bank by obtaining first the charging order nisi and later the charging order absolute had issued execution against the property. The decisive stage at which execution against land is completed for the purpose of s 49(1) of the Bankruptcy Act is the sale of the land, that is, the making of a valid and binding contract of sale between the sheriff and the purchaser. Where execution against land, ie legal estate in land as distinguished from equitable interest therein, is effected by way of a charging order under O 50 r 1, the same test should be adopted, and the decisive stage at which execution is completed for the purpose of s 49(1) is the sale of the land, that is, the making of a valid and binding contract of sale between the execution creditor, or the receiver appointed under O 50 r 9, and the purchaser of the land.

(7) In the instant case, the execution initiated by the bank never reached the stage of sale. After the receivers were appointed and the charging order nisi was made absolute neither the bank nor the receivers took any further step towards realizing the charge. The property was subsequently sold by the mortgagees freed from the charging order absolute of the bank, and the sale was eventually completed on 27 May 1985. Before that, on 16 May 1985, the bank received notice of the act of bankruptcy and the bankruptcy petition had already been presented. Hence at that date the bank had not completed execution against the property and were therefore not entitled under s 49(1) of the Bankruptcy Act to retain the benefit of their execution. Although at the time the bank had a charge on the property, owing to the subsequent intervention of the bankruptcy, the bank could no longer rely on that charge and claim to rank as a secured creditor. The charging order, apart from being an instrument creating a charge on the property, was also a mode of execution, and by the operation of s 49(1) the bank was no longer entitled to retain the benefit of that charge against the Official Assignee.

Cases referred to

1 *Coulson's Ltd* v *Dyer* [1960] NZLR 281 (distd)
2 *Roberts Petroleum Ltd* v *Bernard Kenny Ltd* [1983] 2 AC 192 (folld)
3 *Re Overseas Aviation Engineering (GB) Ltd* [1963] Ch 24 (folld)
4 *Re a Debtor, ex p Okill & Anor* v *Gething & Anor* [1977] 3 All ER 489 (folld)
5 *Rainbow* v *Moorgate Properties Ltd* [1975] 2 All ER 821 (refd)

Legislation referred to

Administration of Justice Act 1956 [UK] ss 34(1), 35(1) & 36(4)
Bankruptcy Act (Cap 20, 1985 Ed)
Bankruptcy Act 1908 [NZ] s 80
Bankruptcy Act [UK] s 40(2)
Code of Civil Procedure [NZ]
Companies Act (Cap 50, 1985 Ed) s 334(2)
Companies Act 1948 [UK] s 325
Conveyancing and Law of Property Act (Cap 61, 1985 Ed)
County Court Act 1959 [UK] s 141
Land Titles Act (Cap 157, 1985 Ed) ss 63, 67, 68 & 104
Land Registration Act 1925 [UK]
Rules of the Supreme Court 1970 O 50, rr 1 & 9
Supreme Court of Justice Act 1956 [UK] s 35(1)
Supreme Court of Judicature Act (Cap 15, 1970 Ed)
Supreme Court of Judicature Act (Cap 322, 1985 Ed) s 18(2)

Appeal from: Bankruptcy No 561 of 1985 (High Court, Singapore)

Engeline Teh (Mrs) for the appellant.
Deborah Barker (Miss) for the respondents.

Cur Adv Vult

Thean J (delivering the judgment of the court): The facts in this appeal are not in dispute and, so far as relevant, are these. On 24 October 1984, United Overseas Bank Ltd ('the bank') obtained a judgment in the High Court in suit no 6288 of 1984 against one Lim Chiak Kim ('Lim') for the sum of $24,759.93 with interest and costs ('the judgment sum'). Soon thereafter, on 3 November 1984, on an application made ex parte by the bank, a charging order nisi was made imposing a charge on the land and premises belonging to Lim, namely, lot 1776 of mukim X with the house thereon known as 117, Jalan Dermawan ('the property'). At that time, the property had already been brought under the provisions of the Land Titles Act (Cap 157, 1985 Ed) and was comprised (and is comprised) in certificate of title registered in vol 185 folio 22 which was issued on 15 February 1977 and had been mortgaged by Lim in favour of The Bank of Canton Ltd ('the mortgagees'). To protect the interest of the bank, a caveat claiming an interest in the property by virtue of the charging order nisi was lodged with the Registry of Titles on behalf of the bank. Before the charging order nisi was made absolute, the bank applied for and obtained an order on 24 October 1984 appointing receivers to enforce the order and subsequently on 30 November 1984 the charging order was made absolute. Again, a caveat claiming an interest in the property by virtue of the charging order absolute was lodged with the Registry of Titles on behalf of the bank. Thereafter, neither the bank nor the receivers appeared to have taken any step towards enforcing the order absolute or otherwise.

On 26 February 1985, the mortgagees exercised the power of sale and sold the property to a purchaser under a sale and purchase agreement. At or about that time, another creditor, namely, Heller Factoring (Singapore) Ltd ('Heller Factoring'), took action against Lim and on 15 March 1985 obtained a judgment in the High Court

against Lim, and immediately thereafter took out a bankruptcy notice which was served on him on 29 March 1985. He failed to comply with the bankruptcy notice, and following that Heller Factoring presented a bankruptcy petition against Lim on 15 May 1985, and on the following day gave notice of Lim's act of bankruptcy to the bank.

On 27 May 1985, the mortgagees completed the sale of the property and received the proceeds thereof, part of which was applied towards payment of the amount due to them and the balance was held by them or their solicitors. Subsequently, on 26 July 1985, receiving and adjudication orders were made against Lim in the bankruptcy proceedings initiated by Heller Factoring and the respondent ('the Official Assignee') was thereupon constituted the receiver of Lim's estate. The balance of the proceeds of sale then in the hands of the mortgagees or their solicitors was paid to the Official Assignee. In consequence of such payment, the bank claimed from the Official Assignee the judgment sum, which was resisted by the latter on the ground that the execution of the judgment by the bank had not been completed.

On 13 January 1986, the bank applied by notice of motion to the High Court for an order directing the Official Assignee to pay to the bank the judgment sum and costs. The application was heard by Wahab Ghows J on 25 March 1986 and he allowed the application and made the order accordingly. In his grounds of decision, the learned judge said:

> I cannot agree with Miss Teh's contention that para (a) of sub-s (2) of s 49 of the Bankruptcy Act should be construed as if it reads: 'For the purposes of this Act an execution against goods or land is completed by seizure and sale, or in the case of the debtor's equitable interest in land by the appointment of a receiver.' In my view this is not a true construction of that paragraph. In the present case the applicants (the bank), having obtained the order absolute imposing a charge on the property at no 117, Jalan Dermawan, could have enforced it by seizure and sale or by appointment of a receiver. As the said property was already mortgaged to The Bank of Canton Ltd, the applicants applied for and obtained the appointment of receivers by way of execution. In my opinion the appointment of such receivers put the applicants in the rank of secured creditors in respect of the property at no 117, Jalan Dermawan, subject to prior encumbrances, and they are entitled to retain the benefit of the execution against the Official Assignee.
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> In any event, even if Miss Teh's interpretation of para (a) of sub-s (2) of 49 of the Bankruptcy Act were a correct statement of the law, the applicants' interest would prevail over the Official Assignee. The charging orders obtained by the applicants on the land at no 117, Dermawan Road were in fact an execution on the debtor's equity of redemption as the said land was at that time under a legal mortgage to the Bank of Canton Ltd. By the appointment of receivers the execution against the debtor's equitable interest in the said land was completed before the date of the receiving order.

The Official Assignee now appeals against the decision of the learned judge. Lengthy arguments have been addressed to us by counsel for the Official Assignee and the bank respectively on various points; but, in our opinion, the appeal turns on the answers to two main issues which are as follows:

(i) Whether the charging order absolute obtained by the bank constituted a charge on the property, and

(ii) If the answer is in the affirmative, whether the bank was entitled to payment of the judgment sum out of the balance of proceeds of sale of the property.

On the first issue, it is necessary to examine the statutory basis on which a charging order is made. The provisions empowering the High Court to make a charging order affecting land are found in paras (c), (d) and (i) of s 18(2) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed), which at the material time were respectively paras 3, 4 and 9 of the First Schedule to the Supreme Court of Judicature Act (Cap 15, 1970 Ed). Section 18(2)(c), (d) and (i) are as follows:

> 18(2) Without prejudice to the generality of subsection (1) the High Court shall have and shall exercise the following powers:
>
> (c) power to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part of it to be sold, and to give all necessary and consequential directions;
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> (d) power to order land to be charged or mortgaged, as the case may be, in any case in which there is jurisdiction to order a sale;
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> (i) power to enforce a judgment of the court in any manner which may be prescribed by any written law or by Rules of Court made under this Act.

This Act was enacted in 1969 and came into force in January 1970. In the same year the Rules of the Supreme Court 1970 were made by the Rules Committee repealing the Rules of the Supreme Court 1934 and by O 50 introduced for the first time the device of a charging order, no doubt following the Rules of the Supreme Court in England at the time. Order 50 r 1 provides as follows:

> 1(1) The power to make an order under paragraph 4 of the First Schedule to the Act imposing a charge on immovable property or interest in immovable property of a judgment debtor shall be exercisable by the court in Form 102.
>
> (2) Any such order shall in the first instance be an order to show cause, in Form 103 specifying the time and place for further consideration of the matter and imposing the charge until that time in any event.
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> (3) An application for an order under this Rule may be made ex parte by summons.
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> (4) The application must be supported by an affidavit –
>
> (a) identifying the judgment or order to be enforced, and stating the name of the judgment debtor on whose immovable property or interest is sought to impose a charge and the amount remaining unpaid under the judgment or order at the time of the application.
>
> (b) specifying the immovable property on which, or an interest in which, it is sought to impose a charge; and

(c) stating that to the best of the information or belief of the deponent the immovable property or interest in question is the judgment debtor's and stating the sources of the deponent's information or the grounds for his belief.

(5) Unless the court otherwise directs, a copy of the order must, at least 7 days before the time appointed for the further consideration of the matter, be served on the judgment debtor and if the judgment debtor does not attend on such consideration proof of service must be given.

(6) On the further consideration of the matter the court shall, unless it appears (whether on the representation of the judgment debtor or otherwise) that there is sufficient cause to the contrary, make the order absolute with or without modifications.

(7) Where on the further consideration of the matter it appears to the court that the order should not be made absolute, it shall discharge the order.

Form 103, prescribed by r 1(2), is a charging order nisi which may be obtained ex parte by a judgment creditor and by the express provision of the sub-rule, it imposes a charge on immovable property or interest therein of a judgment debtor until further consideration of the matter by the court. Consistent with this sub-rule, Form 103 expressly says that the immovable property or interest therein as described 'do stand charged with payment' of the amount due on the judgment in question until further consideration by the court. After further consideration under rule 1(6), the court may then make the order absolute in the form prescribed, namely Form 102. Again, r 1(1) (which prescribes Form 102) expressly provides that the order imposes a charge on immovable property or interest therein and Form 102 expressly orders that the property or interest therein 'do stand charged with payment' of the amount due on the judgment.

Notwithstanding these provisions and the express terms in Forms 102 and 103, it is argued by Mrs Teh on behalf of the Official Assignee that a charging order under O 50 r 1 does not constitute a charge or create any security interest on the immovable property affected but operates only as a stop notice. The basis for this contention is that s 18(2)(d) of the Supreme Court of Judicature Act does not expressly provide that the charge imposed by the High Court shall be a charge for securing any moneys due on a judgment or order, as contrasted with s 35(1) of the Administration of Justice Act 1956 in England which reads:

> The High Court ... may, for the purpose of enforcing a judgment or order of those courts respectively for the payment of money to a person, by order impose on any such land or interest in land of the debtor as may be specified in the order a charge for securing the payment of any moneys due or to become due under the judgment or order.

We accept that there is a difference between the two provisions but, in our opinion, such difference does not support the argument contended by counsel. Section 35(1) of the English Act confers on the courts in England a specific power to be exercised for a specific purpose; s 18(2)(d) of our Act confers on our High Court a general power and coupled with s 18(2)(i) enables the High Court to impose a charge on immovable property or interest therein for the purpose of enforcing a judgment. In our view, an order made under O 50 r 1 operates as an immediate charge on the property in question.

In further support of her argument, counsel relies on a case in New Zealand, *Coulson's Ltd* v *Dyer*.[1] There, the judgment creditor issued and registered a charging order against the land of the judgment debtor and the latter was subsequently adjudicated a bankrupt. It was held that the charging order, which was made under the Code of Civil Procedure of New Zealand, was not a charge on the land for payment of the judgment debt and that the judgment creditor had not completed execution within the meaning of s 80 of the New Zealand Bankruptcy Act 1908. Section 80 of the Act is in pari materia with s 49 of our Bankruptcy Act and, so far as is material, is in the following terms:

> (1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment as against the Assignee on the debtor becoming a bankrupt unless he has completed the execution or attachment before the date of the adjudication and before notice of the filing of any bankruptcy petition against the debtor, or of the commission of any available act of bankruptcy by the debtor: Provided that –
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> ...
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> (2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure or, in the case of an equitable interest, by the appointment of a receiver.

The report does not produce in detail the rules made under the Code under which the charging order was made. However, it would appear from the judgment of Shoreland J that a charging order made under the relevant rules has a limited life and operation. He said, at p 284:

> (b) The New Zealand charging order is subject to r 319 which provides:
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> 'Such order shall cease to bind the land affected thereby unless some deed of conveyance or instrument of transfer upon a writ of sale is registered within six months after such order has been sealed; but the court or a judge on good cause may from time to time extend the effect of such order for any period not exceeding two years in the whole, and any order granting such extension shall be registered in the same way as the original order.'
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> The English order is not subject to any similar rule.
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> As a process of execution a charging order against land cannot, per se, produce any money in payment to the creditor. It requires to be followed by the further step of writ of sale in order to achieve that end. If it is not followed by writ of sale in sufficient time to result in conveyance or transfer of the property within six months the charging order lapses.

> In my view, a creditor who has gone no further than to register a charging order against land has not "completed the execution" within the ordinary meaning of those words.

Later he said, at pp 284-285:

> In my view, a charging order against land does no more than 'freeze' for a limited period of time the owner's right to deal with the land. It gives the holder no right to possession during the limited period of its life, and, in my view, it confers no estate or interest in the land.
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> It is consistent with this conclusion, and some measure of support for it, that it has been held in New Zealand that a charging order against land is not (to quote the relevant words of the definition of secured creditor) 'a ... charge ... or security on the property of the debtor ...' In *Blaikie* v *Malcolmson* (1886) 4 NZLR 408, the nature of a charging order against land, and the question of whether or not the creditor who had registered the order was a secured creditor was considered. ...
>
> In that case Gillies J held that a charging order against land under our Code was not a charge on the debtor's estate within the meaning of s 61(4) of the Act of 1833. It is implicit in the judgment that the learned judge also held that it was not a security on the property of the debtor. To quote from the learned judge's judgment: 'It is merely a stop order preventing the disposition of the property until the creditor has an opportunity of making his judgment effectual by seizure and sale.'

In our view, this New Zealand case is no support for the contention advanced by Mrs Teh. In any event, in our opinion, the provisions of O 50 r 1 and the forms of order prescribed thereby are too clear and explicit to admit of any argument that a charging order does not constitute a charge on the immovable property against which it was made. We are fortified in our view by the passage from the speech of Lord Brightman (to which we shall advert shortly) in *Roberts Petroleum Ltd* v *Bernard Kenny Ltd*.[2]

In that case, the judgment creditor obtained a charging order nisi over the land of a judgment debtor and an appointment of a receiver to enforce the charge. Thereafter, the shareholders of the judgment debtor passed a resolution for voluntary winding up and creditors' voluntary liquidation subsequently ensued; but two days after the shareholders' resolution, on application by the judgment creditor, the charging order was made absolute by the district registrar. On appeal, Bristow J discharged the order; his decision, however, was reversed by the Court of Appeal. On further appeal, the House of Lords allowed the appeal and restored the order made by Bristow J. The House held that since the voluntary liquidation supervened between the order nisi and the application for the order absolute, that was sufficient cause for not making the order absolute and that Bristow J was right in so holding when he discharged the order nisi. In delivering the main speech of the House, Lord Brightman after referring to and quoting verbatim a substantial part of the order nisi (of which the material part containing the charging provisions is very similar to the corresponding part in Form 103) said, at p 205:

> *I have recited the order fully in order to show its breadth. It created an immediate charge.* It made an immediate appointment of a receiver. Roberts was converted immediately into a secured creditor. By implication the order empowered the receiver to act immediately, though at the risk of Roberts in case the order were not made absolute. It even made an award of costs against the (as yet unheard) judgment creditor. But all this was subject to sufficient cause not being shown to the contrary on April 4. In other words, the order was defeasible, without prejudice to the validity of any interim acts of the receiver, but subject to the judgment creditor's cross-undertaking in damages in case the order was discharged. (emphasis added)

Lord Brightman repeated later substantially what he said when he dealt with an argument advanced on behalf of the judgment creditor. He said, at p 209:

> *The main thrust of Robert's argument is that the order nisi imposes an immediate charge, which is correct,* and that therefore at the date of the commencement of the liquidation the assets were already outside the statutory scheme. That proposition, by reference to date, is also correct. The liquidator was unable, at that date, to collect those assets by going into possession, because the receiver was already in possession. But the weakness of the argument to my mind is that Roberts had no more than a defeasible charge at the date of the commencement of the liquidation, so that the right of the receiver to retain the asset as against the liquidator was only a defeasible right. (emphasis added)

In the instant case, there was imposed on the property a charge created by the order nisi; it was an interim one and was in the words of Lord Brightman 'defeasible'. However, on further consideration under r 1(6) of O 50, that order was replaced by an order absolute imposing a charge on the property, and unlike its predecessor this charge was not defeasible. In our opinion, the order nisi and the order absolute each imposed an immediate charge on the property.

The next question is the nature of the charge imposed and the extent to which it affected the property. The charge is one constituted by a charging order; it is, in our view, a statutory charge. It is not a legal charge created under s 63(2) of the Land Titles Act. It is, however, a charge on the whole of the estate held by Lim in the property subject to any prior encumbrance. On this point, we need hardly go further than the express provisions in the order nisi as well as the order absolute which expressly ordered the immovable property described therein or the rights and interests in such property of the judgment debtor – which at that time was the whole of the estate – to stand charged with payment of the judgment sum. Prior to the making of the charging order nisi, Lim had by an instrument under s 63(1) of the Act created a mortgage in favour of the mortgagees, and by s 63(3), that mortgage did not operate as a transfer of the said property but took effect as a security only.

Hence, at the material time, ie when the charging order nisi and the charging order absolute were made, the legal estate in the property remained vested in Lim. The learned judge was therefore in error when he said that Lim had an equity of redemption in the property. He had the legal estate subject only to the mortgage in favour of the mortgagees.

A question which also arises is whether the charge the bank had on the property was one falling within s 68(1) of the Land Titles Act. Miss Barker on behalf of the bank relies on that subsection and contends that the bank is entitled to payment of the judgment sum out of the balance of the proceeds of sale. Section 68(1) of the Land Titles Act provides as follows:

> The money received by a mortgagee who has exercised his power of sale, after discharge of prior encumbrances to which the sale is not made subject (if any), or after payment into court under the Conveyancing and Law of Property Act of a sum to meet any prior encumbrances, shall be held by him in trust to be applied, firstly in payment of all costs and expenses properly incurred as incident to the sale or any attempted sale, or otherwise; secondly in discharge of the mortgage money, interest and costs, and other money (if any) due under the mortgage; thirdly in payment of subsequent mortgages and charges (if any) in the order of their priority; and the residue of the money so received shall be paid to the person who appears from the land register to be entitled to the mortgaged property or to be authorized to give receipts for the proceeds of the sale thereof.

Under this subsection the mortgagees upon receipt of the proceeds of sale on completion thereof were obliged to hold the same in trust in payment and discharge of the amounts and in the order as therein directed, and in particular, in payment to themselves of the amount due and secured by the said mortgage, and thereafter in payment of any subsequent mortgage or charge in order of their priority and as for the residue, if any, in payment to the person who appears from the land register to be entitled to the property. The expression 'charge' in this subsection has not been defined in the Act, and it is a question of construction whether it includes the charge constituted by the charging order absolute. To construe the expression in its proper context it is necessary to examine the relevant provisions preceding s 68. The expression 'charge' first appears in s 63(2), which provides that a charge may be created to secure the payment of rent charge, annuity or other periodical sum or any money other than a debt. Section 63(4) empowers the parties to the charge to provide therein such covenants or provisions as they think fit governing the disposal of moneys arising from the exercise by a chargee of his power of sale. Next, s 64 extends the provisions of Part IV of the Conveyancing and Law of Property Act (Cap 61, 1985 Ed) to mortgages and charges registered under the Land Titles Act, and these provisions confer on mortgagees or chargees, inter alia, the power of sale of the property mortgaged or charged. This is followed by s 67, which deals with registration of transfer of land by a mortgagee or chargee upon the exercise of the power of sale. We then come to s 68, which by sub-ss (1) and (2), provides for disposal of moneys realized upon the exercise of the power of sale and in the hands of the mortgagee and chargee respectively. In the context of these provisions it seems to us clear that the expression 'charge' in s 68(1) means a charge created under s 63(2) of the Act and does not include any other kinds of charge, such as a charge created by the charging order absolute in the instant case.

Though the charge constituted by the charging order absolute was not a charge registrable under the Land Titles Act, it was nonetheless a charge on the property. The Act recognizes non-registrable interests in land, and under s 104 any person claiming an interest in land, or any person otherwise authorized by any Act to do so, may lodge with the Registrar of Titles a caveat in a prescribed form to protect such interest. That precisely was what the bank did in the instant case. A caveat in respect of the charging order nisi and one in respect of the charging order absolute had been lodged with the Registrar of Titles, and the mortgages had constructive notice – if not actual notice – of the charge. However, for reasons which will be apparent shortly, it is immaterial in this case whether or not the charge was registrable under the Land Titles Act.

We now turn to the second main issue. This issue raises two questions: first, whether the process of obtaining the charging order by the bank is a form of execution of the judgment against Lim, and secondly, if so, whether execution had been completed by the bank at the time when they received notice of the act of bankruptcy committed by Lim. Both questions turn on the construction of s 49 of the Bankruptcy Act (Cap 20, 1985 Ed), the provisions of which are as follows:

> (1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due, or property belonging to him, he shall not be entitled to retain the benefit of the execution or attachment against the Official Assignee unless he has completed the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.
>
> (2) For the purpose of this Act –
>
> (a) an execution against goods or land is completed by seizure and sale, or in the case of an equitable interest in land by the appointment of a receiver;
>
> (b) an attachment of a debt is completed by receipt of the debt;
>
> (c) an attachment of property is completed by the sale of such property and the satisfaction out of the proceeds of the sale of the judgment in execution of which the attachment was made.

The first question does not give rise to any difficulty. It seems to us plain that the bank by obtaining first the

charging order nisi and later the charging order absolute had issued execution against the property. The case of *Re Overseas Aviation Engineering (GB) Ltd*[3] is a direct authority in point. In that case, the defendant having recovered a judgment against the debtor company obtained a charging order nisi and subsequently an order absolute imposing a charge on the leasehold interest of the debtor company. The charging order was duly registered under the Land Registration Act 1925. But no receiver was appointed to enforce the charge. Subsequently, the debtor company went into creditors' voluntary liquidation, and the defendant claimed to rank as a secured creditor by virtue of the charging order absolute. This was contested by the liquidators of the debtor company. It was held by the Court of Appeal, inter alia, that a charging order on the land in question was a form of execution. Lord Denning MR in his judgment said, at pp 39 to 40:

> I am clearly of the opinion that when a judgment creditor obtains a judgment charge on specific land of a company, he thereby issues 'execution' against the land of the company.
>
> The word 'execution' is not defined in the Act. It is, of course, a word familiar to lawyers. 'Execution' means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is 'completed' when the judgment creditor gets the money or other thing awarded to him by the judgment ... And the same meaning is to be found in *Blackman* v *Fysh* [1892] 3 Ch 209 when Kekewich J said that execution means the 'process of law for the enforcement of a judgment creditor's right and in order to give effect to that right'. In cases when execution was had by means of a common law writ, such as fieri facias or elegit, it was legal execution: when it was had by means of an equitable remedy, such as the appointment of a receiver, then it was equitable execution. But in either case it was 'execution' because it was the process for enforcing or giving effect to the judgment of the court.
>
> Applying this meaning of the word 'execution', I should have thought it plain that when a judgment creditor gets a charge on the debtor's property, it is a form of 'execution' for it is a means of enforcing the judgment.

We now turn to the second and vital question: whether the execution had been completed prior to the bank receiving notice of the act of bankruptcy committed by Lim. In the case of *Re Overseas Aviation (GB) Ltd*,[3] the Court of Appeal also decided that as the judgment creditor had not appointed a receiver to enforce the charging order absolute, it had not completed execution within the meaning of s 325 of the Companies Act 1948 and accordingly was not entitled to the benefit of the execution. The decision on this point turned on the construction of s 325 of the Companies Act 1948 (as amended by s 36(4) of the Administration of Justice Act 1956) which is as follows:

> (1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up ...
>
> (2) For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by receipt of the debt, and *an execution against land shall be deemed to be completed by seizure or by the appointment of a receiver.* (emphasis added)

In construing this section, Lord Denning MR said, at p 40:

> There is nothing in s 325 to suggest that the word 'execution' is not used there in its ordinary sense. That section draws distinction between an execution which is 'taken to be completed', or 'deemed to be completed', 'although it has not in fact been completed'. It is completed in fact when the creditor gets his money. It is deemed to be completed 'by seizure or by the appointment of a receiver'. Those words 'by the appointment of a receiver' clearly show that the word 'execution' is used in its ordinary sense – to cover both legal and equitable execution.

He than held that execution had not been completed at the date of commencement of winding up: as of that date no money had been received by reason of the execution and no receiver had been appointed. He said, at p 41:

> So the question comes simply to this: was the execution 'complete' before the commencement of the winding up? It was obviously not completed in fact because on 4 October 1961, no money had been received by reason of the execution. But is it to be completed 'although it has not in fact been completed'? It is completed in fact when the creditor gets his money. It is deemed to be completed 'by seizure or by the appointment of a receiver'. Those words 'by the appointment of a receiver' clearly show that the word 'execution' is used in its ordinary sense – to cover both legal and equitable execution.

In relation to the ratio decidendi in *Overseas Aviation*[3] on this point we have two observations. First, that case was decided in the context of the relevant legislation subsisting in England. The Administration of Justice Act 1956 by s 34(1) abolished the process of execution by a writ elegit and in its place by s 35(1) introduced the charging order as a form of execution, and by s 36(1) enabled a receiver by way of equitable execution to be appointed of a legal estate. The same Act by s 36(4) made consequential amendments to s 40(2) of the Bankruptcy Act and s 325(2) of the Companies Act 1948 with the result that both subsections (as amended) fit in with ss 35(1) and 36(1) of the Administration of Justice Act. That, however, is not the position here. As we have said, the Rules of the Supreme Court 1970 by O 50 r 1 introduced for the first time as a mode of execution the device of a charging order affecting land and by O 50 r 9 the appointment of a receiver to enforce the charge constituted by such charging order. But no consequential amendment along the lines of s 36(4) of the Administration of Justice Act 1956 in England was made at that time or subsequently to s 49(2) of our Bankruptcy Act or for that matter to

s 334(2) of the Companies Act (Cap 50, 1985 Ed). In consequence, this mode of execution by way of a charging order under O 50 is not one contemplated in either of the said subsections. In so far as the instant case is concerned, s 49(2) of the Bankruptcy Act therefore does not define what is completion of execution in relation to the process of execution by way of a charging order. It is true that s 49(2)(a) does provide that in the case of execution against equitable interest in land of a debtor such execution is completed by the appointment of a receiver. That refers to the appointment of a receiver by way of equitable execution in respect of equitable interest in land and not to the appointment of receiver under O 50 r 9 to enforce the charging order.

Secondly, and this we consider as by no means unimportant, there is a slight difference, but an appreciable difference, between s 49(2) of our Bankruptcy Act and s 325(2) of the English Companies Act 1948, in that s 49(2) defines what is completion of execution whereas the latter defines what is taken or deemed to be completion of execution. It seems to us therefore that s 49(2) does not make a distinction between what is completion of execution in fact and what is deemed to be completion of execution, which distinction according to Lord Denning MR was present or was contemplated in s 325(2) of the English Companies Act 1948: see his judgment in *Overseas Aviation*[3] at p 40.

As s 49(2) of our Bankruptcy Act does not define what is completion of execution in the case of execution by way of a charging order under O 50, it is therefore necessary to consider at what stage such a mode of execution is completed within the meaning of s 49(1). This, in our view, must be determined in the context of s 49 and in a manner consistent with that section. It is significant to note that under para (a) of s 49(2), as regards execution against goods and land, the receipt of moneys is not a necessary criterion for determining completion of execution. The mode of execution against land by way of a writ of seizure and sale as contemplated in para (a) is not provided for by the Rules of the Supreme Court 1970. Assuming that such a mode is still available in law – as to which see the learned article entitled 'Execution Against Land In Singapore – Some Problems' by Associate Professor Tan Sook Yee in [1987] 1 MLJ xv – such execution is completed upon the sale of the land seized in execution and not upon receipt of the proceeds of sale. The decisive stage at which execution against land is completed is therefore the sale of the land, that is, the making of a valid and binding contract of sale between the sheriff and the purchaser. This position is made even clearer by the corresponding provisions in s 334(2) of our Companies Act, which is as follows:

> (2) For the purposes of this section –
> (a) an execution against goods is completed by seizure and sale;
> (b) an attachment of a debt is completed by receipt of the debt; and
> (c) *an execution against land is completed by sale* or, in the case of an equitable interest, by the appointment of a receiver. (emphasis added)

Consistent with these statutory definitions of completion of execution, it seems to us that where execution against land, ie legal estate in land as distinguished from equitable interest therein, is effected by way of a charging order under O 50 r 1, the same test should be adopted, and, in our opinion, the decisive stage at which execution is completed for the purpose of s 49(1) is the sale of the land, that is, the making of a valid and binding contract of sale between the execution creditor, or the receiver appointed under O 50 r 9, and the purchaser of the land.

In the instant case, the execution initiated by the bank had never reached the stage of sale. After the receivers were appointed and the charging order nisi was made absolute neither the bank nor the receivers took any further step towards realizing the charge. The property was subsequently sold by the mortgagees freed from the charging order absolute of the bank, and the sale was eventually completed on 27 May 1985. Before that, on 16 May 1985, the bank received notice of the act of bankruptcy of Lim and bankruptcy petition had already beeen presented against Lim. Hence, at that date the bank had not completed execution against the property and was therefore not entitled under s 49(1) to retain the benefit of their execution. In our opinion, although at that time the bank had a charge on the property, owing to the subsequent intervention of Lim's bankruptcy, the bank could no longer rely on that charge and claim to rank as a secured creditor. In other words, the charging order, apart from being an instrument creating a charge on the property, was also a mode of execution, and by the operation of s 49(1) the bank was no longer entitled to retain the benefit of that charge against the Official Assignee. Support for this can be found in the decision in *Re a Debtor, ex p Okill & Anor* v *Gething & Anor*.[4] There, the judgment creditors obtained an order pursuant to s 141 of the County Court Act 1959 charging the debtor's certain freehold property as security for payment of the judgment debt, but did not seek to enforce the charge by obtaining the appointment of a receiver. Subsequently, the judgment creditors initiated bankruptcy proceedings against the debtor and acting on advice that they were not a secured creditor asserted in the bankruptcy petition that they did not hold any security on the debtor's estate. Eventually, both receiving order and adjudicating order were made by the county court against the debtor. Two years later, the debtor applied to the county court for annulment of the adjudicating order and rescission of the receiving order and dismissal of the petition on the ground that the judgment creditors did not comply with the requirements of the Bankruptcy Act in that they did

not disclose the security constituted by the charging order. Thereupon, the judgment creditors applied for the petition to be amended. The county court judge allowed the application by the debtor, but on appeal to the divisional court his decision was reversed. The appellate court held, inter alia, that though the judgment creditors by virtue of the charging order had a charge on the judgment debtor's property, they had not completed the execution when they presented the bankruptcy petition against the judgment debtor and in the circumstances they could not be treated as a secured creditor for the purpose of the Bankruptcy Act. Goulding J in delivering the judgment of the court said, at p 493:

> For bankruptcy purposes, a charging order is not merely an instrument imposing a charge. It is also, for the purposes of s 40 of the 1914 Act, a form of execution, and the execution is not completed until the judgment creditor obtains the appointment of a receiver. If that is not done before (among other alternatives) the creditor has notice of the presentation of a bankruptcy petition, he is, by the operation of s 40, not entitled to retain the benefit of the charge against the trustee in bankruptcy. In other words he cannot rank as a secured creditor in the administration of the bankruptcy's estate. That follows from the decision of the majority of the Court of Appeal in *Re Overseas Aviation Engineering (GB) Ltd* [1983] 1 Ch 24, a case under the corresponding provisions of the Companies Act 1948

and he relied on the following passage of the judgment of Buckley LJ in *Rainbow* v *Moorgate Properties Ltd*[5] at p 825:

> The effect of the petition having been presented ... is that if eventually a winding-up order is made, the plaintiffs will be unable to insist on their charging orders, but if no winding-up order is ever made, and if the charging orders remain in force, the plaintiffs will remain secured creditors of the company.

In the result, we allow the appeal, set aside the judgment of the High Court and dismiss the application by way of notice of motion dated 13 January 1986 made by the bank. The bank will have to pay the costs here and below.

There will be the usual consequential order for payment to the Official Assignee or his solicitors the amount deposited by the bank as security for costs in this appeal.

Order accordingly.

Solicitors: *Shook Lin & Bok*; *Khattar Wong & Partners.*

Reported by *PS Ranjan*

Lee Hiok Tng & Anor v Ng Yuk Wah & Ors

HIGH COURT (SINGAPORE) – ORIGINATING SUMMONS NO 1057 OF 1984
LAI KEW CHAI J
14 JULY 1988

Trusts and trustees – Wills – Construction – Conflicting directions in will – Date of vesting – Ascertainment of class of beneficiaries – Class closing rules

By a will dated 2 March 1961, the testator directed that the date of distribution be the date five years after his death. He died on 14 February 1964 and the date of distribution was hence 14 February 1969. After making certain specific bequests, he made provision for the distribution of the income of his residuary estate by cl 17 of his will. By cl 18 of his will, he made provision for the corpus of his residuary estate. By cl 17(h) of the will, the testator directed that his second wife Bek Chew Tay receive a certain portion of the distributable income of his residuary estate but that if she died before the date of distribution, that portion was to be passed to or distributed amongst the testator's son or sons by her but if there be no such son or sons it was to be added on to the residue of his estate to be applied and dealt with in accordance with cl 17(e) of the will. By cl 17(e), the testator made provision for the purchase of immovable property in China and the maintenance and upkeep of the ancestral home and for ancestor worship but it was common ground between the parties that none of those purposes could be effected. However, it was further directed by cl 17(e) that the balance of the income and property, if any, was to be accumulated until the youngest of the testator's grandsons by his sons shall attain the age of twenty-one years and was to be divided equally amongst all such grandsons. However, by cl 18 of the will, the testator gave a different direction regarding the corpus of his residuary estate in that he directed the distribution of the corpus on the date of distribution amongst various beneficiaries mentioned in cl 17(b) of the will, including his sons and grandsons. By cl 23 of the will, the testator directed that any property ineffectively disposed of by his will was to pass to his seven sons named therein. Bek Chew Tay died before the testator died and therefore also before the date of distribution.

The questions that arose in regard to the construction of the will were:

(1) whether on the date of distribution Bek Chew Tay's portion of the corpus of the residuary estate became divisible under cll 17(b)(vi) and 18 of the will
   (i) between those sons of the testator of whom she was the mother; or
   (ii) in some other, and, if so, what manner;

(2) whether on the date of distribution, the shares in the said corpus dealt with by cl 17(e) of the will became or will become applicable under cl 17(b)(vii) and cl 18 of the will
   (i) upon trusts for ancestor worship; or
   (ii) upon trusts for the benefit of all the testator's grandsons living at his death; or
   (iii) upon trusts for the benefit of all the testator's grandsons in being at the date of distribution; or
   (iv) upon trusts for the benefit of all the testator's grandsons whether or not in being at the date of distribution living when the last of such grandsons shall attain the age of twenty-one years; or